RECORD AND BRIEF

No. 15-1391

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In The
Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINT ACADEMY, STEVE MILLES, PATIO.COM and DAVID ROSS,

Petitioners,

v.

ERIC. T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute for Justice challenges laws across the nation that regulate a wide array of both commercial and non-commercial speech. In much of this litigation, *amicus* has been confronted with the central question presented in this case: whether a restriction on communicating certain information should be characterized as a restriction on "speech" (and therefore subject to robust judicial scrutiny) or whether it should instead be characterized as a restriction on "conduct" (and therefore subject only to rational-basis review).

The Second Circuit got this vitally important constitutional question wrong. In doing so, the court broke with binding Supreme Court precedent, most notably *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). Although *Humanitarian Law Project* is one of this Court's most recent and most authoritative pronouncements on the test for distinguishing regulations of speech from regulations of conduct, the Second Circuit

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[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than the *amicus curiae* – contributed money that was intended to fund preparing or submitting this brief. Pursuant to Supreme Court Rule 37(3), counsel for *amicus* states that counsel for the petitioners and counsel for the respondents have consented to the filing of this brief.

overlooked that decision. *Amicus* is deeply concerned that this ruling, if allowed to stand, will undermine this important precedent and imperil the First Amendment rights of businesses and consumers throughout our nation.

SUMMARY OF ARGUMENT

The central question in this appeal is whether New York's anti-surcharge law is a regulation of speech that must satisfy First Amendment scrutiny, or whether it is instead a regulation of conduct, to be evaluated under the more lenient rational-basis standard. Under this Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), this is not a close call: New York's law operates as a restriction on speech that must be evaluated under the First Amendment.

New York allows businesses to have two prices for products or services – a cash price and a credit-card price. But New York bans businesses from *saying* that they are charging a higher price for credit-card customers. Instead, to operate lawfully, businesses must label the price disparity as a "discount" for non-credit-card users instead of as a "surcharge" for credit-card users. In other words, the law's penalties are triggered solely by how a seller communicates its prices to customers. Under *Humanitarian Law Project*, that fact is dispositive, and makes New York General Business Law § 518 a regulation of speech, not conduct.

The rule announced in *Humanitarian Law Project* was not new, it is the same commonsense approach to distinguishing speech from conduct that this Court has applied in commercial-speech cases as far back as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The decision below cannot be reconciled with this unbroken line of precedent, and for that reason must be reversed.

ARGUMENT

New York's anti-surcharge provision limits buyer-seller communications. For this reason, it must satisfy First Amendment scrutiny. Yet, the Second Circuit recast the law as regulating only "conduct," allowing it to dispose of Appellants' claim under mere rational-basis review. As explained in Section A, that conclusion cannot be reconciled with the Supreme Court's recent ruling in *Humanitarian Law Project*, 561 U.S. 1. As explained in Section B, *Humanitarian Law Project* was not unique in this regard, as it merely restated the commonsense approach this Court has always used in distinguishing speech from conduct, even in cases involving commercial speech.

A. Under *Humanitarian Law Project*, Section 518 regulates speech because it is triggered by speech.

The First Amendment issues in this case are controlled by *Humanitarian Law Project*, 561 U.S. 1 – one

of this Court's most recent and most authoritative pronouncements on the line between speech and conduct. In that case, the Court considered the constitutionality of a federal law that criminalized giving "material support" to designated foreign terrorists in the form of, among other aid, "training" and "expert advice or assistance." 18 U.S.C. § 2339B(g)(4); *see also Humanitarian Law Project*, 561 U.S. at 8-9. The plaintiffs – U.S. citizens and domestic organizations – wished to provide training and legal assistance to a covered terrorist group "on how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief." *Humanitarian Law Project*, 561 U.S. at 14-15. Put more simply, they wanted to give prohibited "material support" by communicating advice. *See id.*

As in this case, the government defended the challenged law by arguing that it governed only conduct, and not speech. *Id.* at 26. But this Court emphatically and unanimously rejected that argument. *See id.* at 28 (majority opinion); *id.* at 42 (Breyer, J., dissenting).[2] In so doing, the Court articulated a clear test for distinguishing speech from conduct, holding that the First Amendment is implicated whenever a law's applicability turns on the content of a speaker's message. *Id.* at 27-28 (majority opinion).

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[2] Although Justice Breyer and two other Justices dissented from the majority's holding on the merits in *Humanitarian Law Project*, the dissenting Justices agreed with the majority that the challenged law was a restriction on speech, not conduct. 561 U.S. at 42 (Breyer, J., dissenting).

Applying that test to the material-support prohibition, this Court concluded that the law "regulates speech on the basis of its content," because whether the plaintiffs could lawfully communicate with designated terrorist organizations "depends on what they say." *Id.* at 27. If their speech imparted a "specific skill" or conveyed advice derived from "specialized knowledge" – training on international law, for example – then it would be barred. By contrast, if their speech conveyed general or unspecialized knowledge, it would be lawful. *Id.* So framed, the material-support law targeted parties' speech and called for heightened First Amendment scrutiny. *Id.*[3]

This reasoning applies with full force here. Petitioners may lawfully charge customers a higher price if they use credit cards than if they use any other form of payment. What New York's anti-surcharge law restricts is merely how sellers convey that price gap to consumers. In other words, the business owners' risk of criminal prosecution entirely "depends on what they say." *Humanitarian Law Project*, 561 U.S. at 27. If they phrase the price difference as a discount for non-credit-card transactions, then no crime has been committed.

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[3] Unlike Respondents – and the decision of the court below – the government in *Humanitarian Law Project* did not advocate against all First Amendment scrutiny of the challenged law. *See* 561 U.S. at 26-27 (majority opinion). Instead, the government argued for intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Thus, New York's position in this case is even more extreme than the argument that this Court unanimously rejected in *Humanitarian Law Project*.

But if they phrase the difference as an added cost for credit-card users, then they are breaking the law.

Because the only difference between a lawful "discount" and an illegal "surcharge" boils down to whether a speaker uses the government's preferred phrasing, "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. Accordingly, the anti-surcharge provision must be reviewed as a content-based restriction on speech.

Indeed, New York's restriction is even more clearly speech-oriented than the law at issue in *Humanitarian Law Project*. In that case, the federal material-support law barred many types of aid to terrorist groups, including obvious non-speech conduct such as furnishing "safehouses" and "lethal substances." 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4). For this reason, it could be argued that the law "*generally* function[ed] as a regulation of conduct." *Humanitarian Law Project*, 561 U.S. at 27. But the same cannot be said for the anti-surcharge provision. Unlike the material-support law, New York's law operates as a limit on speech alone; it is triggered exclusively by speech and therefore must be subject to the First Amendment.

B. *Humanitarian Law Project* used the same commonsense logic this Court has always used in commercial-speech cases for distinguishing speech from conduct.

Although *Humanitarian Law Project* was not itself a commercial-speech case, the commonsense approach this Court took in that decision to distinguishing speech from conduct is similar to that which this Court has historically employed in commercial-speech cases as far back as this Court's seminal decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In that case, this Court considered the constitutionality of a Virginia law that prohibited licensed pharmacists from engaging in "unprofessional conduct." *Id.* at 752. Yet despite being nominally a regulation of "conduct," this Court had no trouble recognizing that, as applied to the conduct of "advertising of the price for any prescription drug," the law was triggered exclusively by speech. *Id.* Accordingly, this Court analyzed the law as a regulation of commercial speech, ultimately holding it unconstitutional.

From that point on, this Court's analysis in commercial-speech cases has regularly looked to whether the application of a challenged regulation was triggered by speech or by conduct. That is why this Court determined that the First Amendment was implicated by rules of professional "conduct" that regulated an attorney's right to describe himself as a specialist on his letterhead. *Peel v. Attorney Registration & Discipline Comm'n of Ill.*, 496 U.S. 91, 104-05 (1990). And it is also

why, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, this Court held that the First Amendment was not implicated by a drug-paraphernalia ordinance that regulated the display of merchandise, rather than the communication of any information about that merchandise. 455 U.S. 489, 496 (1982). What these cases make clear is that the distinction between a regulation of speech and a regulation of conduct is, ultimately, a practical inquiry that turns on how the law is enforced in the real world.

The implications of these precedents for this case are best illustrated by the contrast between the decision below and the decision of the U.S. Court of Appeals for the Eleventh Circuit in *Dana's Railroad Supply v. Attorney General of Florida*, 807 F.3d 1235 (11th Cir. 2015), which considered the constitutionality of Florida's nearly identical anti-surcharge law. Unlike the court below, the Eleventh Circuit easily concluded that Florida's anti-surcharge law was a regulation of speech, rather than conduct, and it did so by looking at how the law was enforced in the real world. Recognizing that the challenged statute was the logical equivalent of banning restaurants from selling half-empty beverages while expressly allowing half-full ones, the Eleventh Circuit concluded that the law was triggered by descriptions of whether a price differential was a credit-card surcharge or a cash discount, rather than by the prices themselves, which were unregulated. *Id.* at 1245-46. As the Eleventh Circuit put it, the "surcharge ban" would be more accurately described as the "surcharges-are-fine-just-don't-call-them-that law." *Id.*

at 1245. And thus, because the application of the law was triggered by speech, First Amendment scrutiny applied. *Id.*

That was the correct approach, and it is the approach this Court should take here. Doing otherwise, and holding that New York's anti-surcharge law is a regulation of conduct, rather than speech, would not only be a break with decades of this Court's previous precedent on the speech/conduct distinction, it would also sow confusion in an area of the law that this Court has long treated as involving nothing more than practical, commonsense reasoning about how regulations in the commercial realm are actually enforced. Accordingly, this Court should reverse the decision of the Second Circuit and hold that Section 518 is a regulation of speech that must be analyzed as such.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Dated: November 17, 2016 Respectfully submitted,

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